

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs July 21, 2009

**STATE OF TENNESSEE v. JAMES R. BUTLER**

**Appeal from the Criminal Court for Davidson County  
No. 2003-B-1075 Seth Norman, Judge**

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**No. M2008-01842-CCA-R3-CD - Filed October 20, 2009**

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Appellant, James R. Butler, was indicted by the Davidson County Grand Jury in 2003 for possession of cocaine in excess of twenty-six grams with the intent to sell or deliver in violation of Tennessee Code Annotated section 39-17-417. Appellant later pled guilty and received an eight-year sentence. The trial court ordered Appellant to spend six months in incarceration at 100% and the balance of the sentence on probation. A violation of probation warrant was served on Appellant, allegedly due to a subsequent arrest. As a result, the trial court ordered Appellant to serve the remainder of his eight-year sentence in incarceration. On appeal, Appellant argues that the trial court erred by revoking Appellant's probation "without a finding that the revocation was based on a preponderance of the evidence." We determine that the trial court improperly revoked Appellant's probation without a finding that the revocation was based on a preponderance of the evidence. Consequently, we reverse the revocation of probation and remand the case for a hearing in which the trial court determines whether the preponderance of the evidence justifies a revocation.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Reversed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Glenn R. Funk, Nashville, Tennessee, for the appellant, James R. Butler.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General, and Renee Erb, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### *Factual Background*

Appellant was indicted in April of 2003 for possession of cocaine in excess of twenty-six grams with the intent to sell or deliver. Appellant pled guilty in September of 2003 to possession of more than .5 grams of cocaine with the intent to sell or deliver, a Class B felony, in Davidson County. The plea agreement did not specify a sentence but left that determination up to the trial court. After a sentencing hearing, Appellant was sentenced to eight years. The trial court ordered Appellant to serve the sentence in split confinement, six months to be served day-for-day, and the balance of the sentence to be served on probation.

In December of 2007, Appellant's probation officer, James Sanders, filed a violation of probation warrant against Appellant, alleging that Appellant has "arrests since being placed on probation" and that Appellant "never told his probation officer about any of the new arrests." The warrant instructed the court to "See Attachment" with regard to the new arrests, but the record before this Court on appeal contains no attachment to the probation violation warrant.

The trial court held a hearing on the warrant. At the hearing, Appellant's probation officer, Mr. Sanders, testified that Appellant "had a variety of charges over a short period of time" and that he did not report any of the charges. Mr. Sanders learned of the new charges when he was contacted by federal agents about "some weapons charges." Mr. Sanders listed several charges that had been amassed by Appellant, including a charge for contributing to the delinquency of a minor on July 18, 2007; charges for possession of a controlled substance for casual exchange and implied consent violation from an unspecified date; theft of private property from September of 2007; and drug paraphernalia, possession, open container violation and DUI from November of 2007. Mr. Sanders also mentioned charges for failure to report an accident, another charge for possession of a controlled substance for casual exchange, DUI, unlawful possession of a handgun by a felon, and resisting arrest from unspecified dates in 2007. According to Mr. Sanders, Appellant continued to report to the probation office during this time but "lied" on his paperwork about the new charges.

Mr. Sanders admitted on cross-examination that Appellant left the box blank "two times" on the probation reporting form in the spot where Appellant was to indicate whether he had been arrested since his last reporting. Further, Mr. Sanders admitted that Appellant properly reported a simple possession charge that ended with a fine and costs. Counsel for Appellant asked Mr. Sanders about the status of the charges against Appellant, and Mr. Sanders was unaware if the charges had resulted in convictions or had been dismissed. Counsel for Appellant informed Mr. Sanders that the majority of the charges against Appellant had been dismissed one week prior to the hearing. Mr. Sanders also admitted that the form Appellant was required to fill out asked if he had been "questioned or arrested" by the police and that some of the charges that Appellant had received were "citations."

At the conclusion of the hearing, the trial court made the following findings of fact and conclusions of law:

There is some case law to the effect that the arrest itself is not sufficient for a probation violation warrant, and that I can understand. But when you get arrested on four separate series of warrants, then something is wrong.

The first time I may be able to understand, even the second time I may be able to understand, but four series of arrest warrants?

....

Probation violation warrant sustained. Sentence placed into effect.

Appellant filed a timely notice of appeal.

#### *Analysis*

On appeal, Appellant contends that the trial court erred by revoking Appellant's probation where there was no finding that the revocation was based on a preponderance of the evidence. Specifically, Appellant cites this Court's opinion in *State v. Calvin Austin*, No. W2005-02592-CCA-R3-CD, 2006 WL 4555240 (Tenn. Crim. App., at Jackson, Aug. 9, 2006), and contends that this Court must reverse the matter. The State disagrees, arguing instead that "the trial court revoked the defendant's probation for failing to report arrests and new charges to his probation officer as testified to by that officer - not merely for the actual arrests or charges."

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. T.C.A. §§ 40-35-310, -311; *State v. Shaffer*, 45 S.W.3d 553, 554 (Tenn. 2001). After finding a violation of probation and determining that probation should be revoked, a trial judge can: (1) order the defendant to serve the sentence in incarceration; (2) cause execution of the judgment as it was originally entered, or, in other words, begin the probationary sentence anew; or (3) extend the probationary period for up to two years. *See* T.C.A. §§ 40-35-308(c) & -311(e); *State v. Hunter*, 1 S.W.3d 643, 647-48 (Tenn. 1999). The decision to revoke probation rests within the sound discretion of the trial court. *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Revocation of probation or a community corrections sentence is subject to an abuse of discretion standard of review, rather than a de novo standard. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). An abuse of discretion is shown if the record is devoid of substantial evidence to support the conclusion that a violation of probation has occurred. *Id.* The evidence at the revocation hearing need only show that the trial court exercised a conscientious and intelligent judgment in making its decision. *State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995).

Appellant cites *Calvin Austin*, to support his argument that the trial court erred because it based the revocation of probation merely on the fact that he was arrested rather than by finding by a preponderance of the evidence that Appellant committed a violation of probation. In *Calvin Austin*, the trial court based the revocation of probation on the fact that the defendant had been arrested on new charges, without separate evidence from the State to corroborate this claim. 2006 WL 4555240, at \*2. In *Calvin Austin*, the trial court heard testimony from the defendant's probation officer, who testified that the defendant had been arrested and that the new arrest was the basis for the probation violation warrant. *Id.* at \*1. The appellant was willing to stipulate that he had been arrested, but he specifically declined to stipulate probable cause for the arrest. *Id.* This Court determined:

While we recognize that a new arrest and pending charges are proper grounds on which a trial court can revoke a defendant's probation, a trial court may not rely on the mere fact of an arrest or an indictment to revoke a defendant's probation. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). A revocation on this basis requires the State to "produce evidence in the usual form of testimony" in order to establish the probationer's commission of another offense while on probation. *State v. Walter Lee Ellison, Jr.*, No. 01C01-9708-CR-00361, 1998 WL 272955, at \*2 (Tenn. Crim. App., at Nashville, May 29, 1998); see *State v. Michael Chaney*, No. 01C01-9801-CC-00010, 1999 WL 97914, at \*1 n.2 (Tenn. Crim. App., at Nashville, Feb. 18, 1999).

*Id.* at \*3. In *Calvin Austin*, the only evidence before the trial court was the testimony of the probation officer and the stipulation by the defendant that he had been arrested while on probation. The record did not contain the new arrest warrant or indictment on which the violation of probation was based. *Id.* Further, the record failed to include the probation violation warrant. Finally, the trial court based its decision to revoke the defendant's probation on the mere fact of an arrest rather than by a preponderance of the evidence. *Id.* As a result, this Court concluded that the trial court abused its discretion.

The factual situation herein is remarkably similar. The only testimony offered at the hearing was that of Appellant's probation officer. He was unsure of the number of arrests and citations Appellant had received and could not even specify the dates of the new charges to the trial court. Further, the State failed to introduce copies of the pending charges to the trial court at the hearing. Appellant did not stipulate that he had received any additional charges. Moreover, Mr. Sanders admitted that Appellant had left several probation report forms blank in the spot that he was to indicate whether he was arrested and that Appellant actually reported a simple possession citation. The trial court, at the conclusion of the hearing, mentioned that an "arrest itself is not sufficient for a probation violation warrant" but concluded that because Appellant had been "arrested on four separate series of warrant, . . . something [wa]s wrong." This statement by the trial court belies the State's argument that the actual basis for the revocation of probation was Appellant's alleged failure to report new arrests. The analysis of *Calvin Austin* applies herein. The trial court abused its discretion by revoking Appellant's probation because the preponderance of the evidence does not

support the trial court's decision. Consequently, we reverse and remand the judgment of the trial court for a hearing in which the trial court conducts a hearing and then makes a determination as to whether the preponderance of the evidence supports the revocation of probation.

*Conclusion*

For the foregoing reasons, the judgment of the trial court is reversed and the matter is remanded to the trial court for a hearing in which the trial court determines whether the preponderance of the evidence justifies a revocation of probation.

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JERRY L. SMITH, JUDGE